

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7088

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

p/s

DOCKET NO. 77-7088

RICHARD J. STULL,

Plaintiff-Appellant,

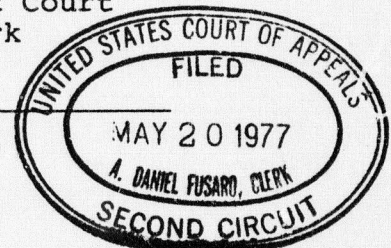
-against-

NICHOLAS H. BAYARD, PAUL L. MILLER, HOWARD PIPER,
THOMAS F. PIPER and WILLIAM T. PIPER, JR.,
INDIVIDUALLY AND AS EXECUTORS OF THE ESTATE
OF WILLIAM T. PIPER, DECEASED, NICHOLAS H. SALGO,
DAVID W. WALLACE, BANGOR PUNTA CORPORATION and
THE FIRST BOSTON CORPORATION,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

APPELLANT'S REPLY BRIEF



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UNITED STATES COURT OF APPEALS
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APPELLANT'S REPLY BRIEF

STATEMENT

In their desire to have the order entered
below affirmed, respondents have omitted several facts
and have misstated others which create an erroneous

impression. These are the following:

1. The District Court did not discuss the other grounds urged by the appellees in support of dismissal (R.B. p. 2).* The reason that the District Court did not discuss or reach the other grounds was that it expressly limited the hearing to the issue of the Statute of Limitations and directed appellant to file papers only with respect to that issue. Thus, appellant had no opportunity, and did not submit, any opposition to the other grounds advanced by respondents.

2. Respondents assert that "[b]etween 1969 and 1972, Richard filed four amended complaints in Stull v. Greene...." (R.B. p.3). Appellant filed four amended complaints not between 1969 and 1972 but between 1969 and 1970. The complaints were filed in March, 1969, April, 1969, May, 1969 and the last was filed in May, 1970. Two of those complaints were signed by

*Respondents' brief will be designated R.B.;
Appellant's brief will be designated A.B.

appellant's law partner. These complaints were consistent with respondents' wrongs. The complaints attacked the Chris-Craft offer as being inadequate. It was not until 1971, as testified to by appellant on his deposition, after Judge Pollack's decision that he became aware of respondents' wrongdoing.

3. The denial of the class motion in Stull v. Pool, (63 F.R.D. 702) (R.B.4) was accompanied by the withdrawal of appellant's firm from the case, the substitution of Milberg and Weiss, as counsel for plaintiff in that action and the withdrawal of appellant from any association with the conduct of his wife's litigations. When settlement of those litigations were carried on by respondents and Milberg and Weiss, effort was made to bring appellant into those discussions and to have him become a party to the settlement. He

refused and expressly informed counsel that he would not be a party and would commence an action based upon the Bangor Punta-Piper misconduct. This action was commenced prior to the settlement approval.

ARGUMENT

POINT I

APPELLANT'S ACTION
IS NOT BARRED BY THE
STATUTE OF LIMITATIONS

Respondents implicitly concede that appellant did not discover their wrongful conduct until December 1971* - the date of Judge Pollack's initial decision. In arguing that the New York Statute of Limitations applies, respondents totally ignore the fact, as we have pointed out in our main brief, that federal law determines when that statute commences to run (A.B. pp.11-12).

Respondents blithely suggest that since the New York Statute of Limitations has a provision dealing with discovery of the fraud that provision governs.

* Respondents have not offered either below or here any evidence that would suggest that appellant could have learned of the misconduct earlier than December, 1971.

It does not. The New York provision must give way to the federal rule under the Supremacy Clause of the United States Constitution.

The issue has been discussed and ruled upon in Pollard v. United States, 384 F.Supp. 304 (M.D. Alabama 1974). The Court held:

"Because Alabama law is looked to for the proper statute of limitations to apply to a cause of action arising under the civil rights statutes, it is arguable that Alabama law should also be looked to for any rules suspending or tolling that statute of limitations. Title 7. § 42 of the Alabama Code extends the period within which any action based upon fraud may be brought for an additional period of one year following discovery. This statute is in conflict with the general federal principle that a fraudulently concealed cause of action does not accrue until discovered, Holmberg v. Armbrecht, supra, and must, therefore, be rejected in favor of the inconsistent federal rule. 42 U.S.C. §1988." [Note 2 at p. 307]

Nor does Klein v. Shields & Company, 470 F. 2d 1344, 1346 (2d Circuit 1972) relied on by respondents (R.B. p. 5, Footnote) change the result. There, plaintiff had asserted essentially state claims in a federal guise. Indeed, plaintiff had first asserted his claims in a counterclaim against the defendants in a state court action brought by them. That action remained dormant. Plaintiff commenced his federal claim 11 years after he had asserted his original claims in the state court

action. The issue of federal law determining when the Statute of Limitations commenced to run was never raised and could not be, since plaintiff knew of the wrongful conduct prior to the expiration of this limitations period.

Respondents argue that under New York Law a cause of action for fraudulent misrepresentation "accrues for purposes of the limitations of actions when the misrepresentations are made...." (R.B. 5-6). We disagree.

Assuming arguendo that appellant's claim is one for fraudulent misrepresentation, respondents' argument is not supported by the authorities they cite nor by New York Law.

The fundamental rule in New York as quoted by Professor Siegel in his "Practice Commentary, C.203:12 7 B. McKinney's Con. Laws, 125, 127 (1976) (which sentence was curiously omitted by respondents in their quote of Professor Siegel at R.B. 6):

"...phrased another way, the cause of action accrues at that moment when a plaintiff, who is assumed to have full knowledge of all the facts, may maintain an action thereon...."

As noted in our main brief (A.B.14 et seq.), fraud actions as tort actions cannot be maintained until there has been a change of position and damage accrued. In some misrepresentations, such change of position may occur almost simultaneously with the fraudulent representation. In those cases, the Court will hold that the limitations period commences to run from the point of fraudulent representation since a change of position has occurred. The courts hold that the defrauded party has at least suffered nominal damages when he changed his position in reliance upon the fraudulent representations although the full and real damages do not occur until later. Where, however, an interval elapses between the fraudulent representation and the resulting change in position, the courts hold that the statute commences to run from the change in position. See Cooke v. Colman, 150 Misc. 294, 269 N.Y.S. 21 (App. T. 1st Dept. 1934).

Respondents' authorities fall into the first category rather than the second.

Thus, in McConkey Realty Corporation v. Wildermuth, 214 App. Div. 395, 212 N.Y.S. 216 (4th Dept. 1925) (R.B. 6), it was held that a party is defrauded when he accepts a bond and mortgage as a result of misrepresentations.

In Rickel v. Levy, 370 F. Supp. 751 (R.B.6), the Court found that the Statute of Limitations had commenced to run when plaintiff purchased his interest based upon the fraudulent representations.

In Gates Rubber Company v. U.S. M. Corporation, 351 F.Supp. 329 (R.B.6). (Though the case was reversed by the Seventh Circuit) it was held that limitations had commenced to run in 1963 when plaintiff placed an order for a press based upon alleged fraudulent representations though the press was delivered later.

Northrop v. Hill, 57 N.Y. 351 (R.B.6) is equally distinguishable. There, the statute was held to run when plaintiff signed the contract to purchase real estate.

The error in respondents' statement of New York Law is illustrated in Reusens v. Gerard, 160 App.Div.625. 146 N.Y. Supp. 86 (1st Dept.1914), affd. 221 N.Y.665 (1917). There defendants had allegedly issued a fraudulent prospectus for the

sale of stock on November 19, 1906. Plaintiff alleged that based upon that fraudulent prospectus he was induced to subscribe to certain shares of that company on November 30, 1906, paying a portion of the purchase price on December 21, 1906 and several other payments subsequently on varying dates ending on May 9, 1907; that he made a purchase in the open market based upon a prospectus to October 1, 1907.

The action was commenced on January 16, 1913.

The Appellate Division held that the Statute of Limitations barred the claims respecting the subscription of stock, the cause of action having accrued on the date plaintiff made his first payment, i.e. December 21, 1906. The open market purchases were not barred by the Statute of Limitations, the Court holding that the Statute had commenced to run with respect to that cause of action on October 1, 1907. The New York Court of Appeals affirmed the holding.

Thus, Reusens makes clear that the cause of action commences to run not from the moment of the alleged false representation but when plaintiff's rights become fixed i.e. by virtue of having acted thereon or having his rights cut off as in the case at bar.

Instrument Systems Corporation

v. Whitman, et al., 77 Misc.2d 719, 354 N.Y.S.2d 514 (Sup. Ct., N.Y. Co. 1974) underscores appellant's position. There, suit was brought against attorneys for having rendered negligent legal advice to a client. The advice consisted of informing a corporation that a stock option plan would qualify for preferential tax treatment. Based upon that advice, the President granted the options and said grant was approved by the Board of Directors. That occurred on November 10, 1964. The grant was to be submitted for approval to a meeting of the stockholders on February 9, 1965. The grant was approved at that meeting. The stock options were not eligible for preferential tax treatment and suit was commenced on February 8, 1968.

SIPHINX
ERASABLE

Defendants asserted the Statute of Limitations alleging that November 10, 1964 - the date of the initial grant of the option was the date the statute had commenced to run. The Court overruled that objection holding that the date the statute had commenced to run was the date of the shareholders' meeting because "the mistake could have been corrected by appropriate advice to the shareholders at their meeting...." (Page 516 of 354 N.Y.S.2d).

The gratuitous suggestions of respondents that plaintiff could have sued for an injunction (R.B.6, footnote) does not change when the limitations period commenced to run. In the first place, appellant did not learn of the misconduct until December, 1971.

Secondly, the fact that he could have sued for equitable relief did not mean that the Statute of Limitations applicable to another form of relief would commence to run when he was eligible to seek equitable relief. The rule was stated in Klein v. Parke-Bernet Galleries, Inc., 21 A.D. 2d 772,

250 N.Y.S.2d 656, 657 (1st Dept. 1964):

"...the fact that a plaintiff may avail himself of a remedy with a shorter statute does not bar his pursuit of a remedy to which a longer statute is appropriate...."

POINT II

THE STATUTE OF LIMITATIONS
WAS TOLLED UNDER THE DOCTRINE
OF AMERICAN PIPE

We can add nothing that has not already been covered in our main brief except to note that respondents have misread American Pipe and its underlying rationale. The factual predicate upon which respondents' argument rests needs comment.

If respondents' argument is accepted, the factual basis for its acceptance must be that there was an opportunity for appellant to intervene. In fact, there was no such opportunity.

As the record in Stull v. Pool, will disclose, after the class motion was denied, appellant's firm withdrew and the firm of Milberg and Weiss appeared for Mrs. Stull. A motion to renew or reargue the

class motion was then made which was denied pending disposition of the appeal which had been taken from the denial of the first class motion. When the appeal was dismissed, no renewal was made by Messrs. Milberg and Weiss of a class motion, because, apparently, settlement discussions started. When appellant learned of these settlement discussions by way of his being requested by respondents to be part of this settlement, it was too late to intervene for the reasons set forth in our main brief. How does one intervene in a private action which is being settled? In those cases following American Pipe which permitted intervention, the private plaintiffs who were denied class status were continuing the litigation and not settling it.

Arneil v. Ramsey, CCH Fed. Securities

Law Reports ¶ 95,865 ['76-'77 Transfer Binder] (R.B.9)

cited by respondents is inapposite to the case at bar. There, the purported class action sought to uphold the running of the Statute of Limitations had not included plaintiffs Arneil in the class. Subsequently, an amendment was made, after the statute had expired, to include by way of description additional persons in which plaintiffs Arneil would be included. To avoid the running of the statute, the plaintiffs contended that the purported amendment related back to the date of the original complaint. This Court rejected that claim. Hence, Arneil is perfectly consistent with applicable law. There was no reason to apply the doctrine of American Pipe.

POINT III

APPELLANT HAS STANDING
TO BRING THIS ACTION EVEN
THOUGH HE HAS NOT TENDERED HIS
SHARES

Respondents argue that appellant should not be permitted to bring this action since he did not tender to B.P.C. (R.B. 10-11). They contend that his claim would be inherently speculative and untenable.

This claim was not passed on below by the District Court because it expressly limited the hearing to the issue of the Statute of Limitations. Appellant therefore was not permitted to and had no opportunity to submit any opposition with respect to the argument made by respondents. It is respectfully submitted that this Court should not pass upon the argument now raised by respondents.

Respondents' argument is insufficient as a matter of law, in any event.

Nothing in § 14(e) would require proof of actual reliance by appellant upon the claimed fraudulent documents. By like token, there is nothing in the section which requires that appellant actually exchange his Piper Shares before he can complain. Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969); Dyer v. Eastern Trust and Banking Company, 336 F.Supp. 890, 914 (D. Maine 1971); Neuman v. Electronic Specialty Co., CCH F.Sec. L. Rpts. [69-70 Decs.] ¶92,591 (No. Dist. Ill. 1969).

The gravamen of the complaint at bar is that there was a deprivation of a tender offer by respondents' misconduct.

The reason why Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (R.B.10) is inapplicable was noted by this Court in Electronic Specialty Co. v. International Controls Corp., supra, Footnote 6 at p. 945:

"The primary difference is that whereas Rule 10b-5 has as its final phrase 'in connection with the purchase or sale of any security,' § 14(e) ends 'in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.'"

Appellant's deposition does not support respondents' claims. Appellant received the Bangor Punta Registration Statement (C.A. 100) and he looked at it; he offered reasons why he did not accept the B.P.C. offer (C.A. 101-2, 157).

Any claimed contradictory testimony by appellant at best, raises only issues of fact respecting a witness' credibility. These issues require that there be a trial by a trier of the facts.

Colby v. Klune, 178 F.2d 872 (2d Cir.1949). In Re Yarn Processing Patent Validity Litigation, 498 F.2d 271

(5th Cir. 1974) cert.den. 419 U.S. 1057.

Apart from anything else, B.P.C. and the other respondents assisted and helped the individual Pipers to breach their fiduciary duties which they owed to the Piper shareholders. Such conduct makes all equally liable with the Pipers. Irving Trust Co. v. Deutsch, 73 F.2d 121 (2d Cir. 1934), cert. den. 294 U.S. 708; Leven v. Birrell, 92 F.Supp. 436, 444 (S.D.N.Y.1949); Heit v. Bixby, 276 F.Supp. 217, 230 (E.D. Mo. 1967).

CONCLUSION

The District Court should be reversed.

Respectfully submitted,

DEMOV, MORRIS, LEVIN & SHEIN
Attorneys for Appellant

IRVING BIZAR
MARTIN ROSENGARTEN,
Of Counsel

STATE OF NEW YORK)
: COUNTY OF NEW YORK)

Mildred Honig , being duly sworn, deposes and
says:

I am not a party to the action, am over the age of eighteen years, and reside ~~at~~ within City of New York

On May 20, , 1977, I served ^{two copies each of} ~~the~~ within

Appellant's Reply Brief

upon the party therein named by mailing the same to said party or to his attorney at the address designated by him for that purpose, by depositing a true copy thereof in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State, as follows: Rogers & Wells, Esqs., 200 Park Avenue, New York, N.Y., Attorneys for Defendant-Appellee Bangor Punta Corporation, 200 Park Avenue, New York, N.Y. 10017; Messrs. Chadbourne, Parke, Whiteside & Wolff, Attorneys for Defendants-Appellees Howard Piper, Thomas F. Piper and William T. Piper, Jr., 30 Rockefeller Plaza, New York, N.Y. 10020; and Sullivan & Cromwell, Attorneys for Defendant Appellee, The First Boston Corporation, 48 Wall Street, New York, New York 10005.

Mildred B. Honig

Sworn to before me this
20 day of May, 1977

Notary Public

MARTIN ROSENGARTEN
NOTARY PUBLIC, State of New York
No. 31-4509123
Qualified in New York County
Commission Expires March 30, 1974